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# TORT LAW—FEDERAL TORT CLAIMS ACT—ACCRUAL OF MEDICAL MALPRACTICE ACTION—United States v. Kubrick, 444 U.S. 111 (1979)

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TORT LAW—FEDERAL TORT CLAIMS ACT—ACCRUAL OF MEDICAL MALPRACTICE ACTION—*United States v. Kubrick*, 444 U.S. 111 (1979).

## I. INTRODUCTION

The date when a tort action "accrues," thereby triggering the running of the statute of limitations, historically has been contested. The importance of the accrual date is that the running of the statute of limitations effectively precludes recovery for an otherwise valid claim. The United States Supreme Court recently has provided express guidelines for determining when a medical malpractice claim against the federal government will accrue.

In *United States v. Kubrick*,[1] Justice White, writing for a six-to-three majority, reversed the Third Circuit which affirmed a Pennsylvania district court decision regarding accrual of a medical malpractice claim against the federal government. The Supreme Court held that the statute of limitations[2] for actions brought under the Federal Tort Claims Act (FTCA)[3] barred recovery for a patient treated at a Veterans Administration Hospital (VA Hospital). The patient knew that the treatment he received had caused his deafness, but did not suspect, until twenty-nine months later, that he had received negligently performed medical treatment.[4]

On April 2, 1968, William Kubrick, a Korean War veteran, was admitted to the Wilkes Barre, Pennsylvania VA Hospital for treatment of osteomyelitis[5] of the right femur. After surgery, the infectious area was irrigated for thirteen days with a highly effective

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1. 444 U.S. 111 (1979).

2. 28 U.S.C. § 2401(b) (1976).

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

*Id.*

3. 28 U.S.C. § 2674 (1976). "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances but shall not be liable for interest prior to judgement or for punitive damages. . . ." *Id.*

4. 444 U.S. at 118-22.

5. Osteomyelitis is an "[i]nflamation of a bone and its marrow, caused by infection

antibiotic, neomycin. The drug was but one of many antibiotics that could have been used for such treatment. Unfortunately, the large doses of neomycin, which eliminated the infection in his leg, caused tinnitus[6] accompanied by a partial hearing loss.[7] This condition manifested itself in mid-June, about six weeks after Kubrick's discharge from the hospital.[8]

Kubrick was later examined by a host of doctors for his hearing problem.[9] In January 1969, Kubrick was informed that it was possible that the neomycin treatment administered by the VA Hospital was the cause of his hearing impairment.[10] Believing that his hearing impairment was the result of an unavoidable risk associated with the neomycin irrigation treatment and not suspicious of any possibility of malpractice, Kubrick continued correctional treatment for his hearing.[11]

It was not until June 2, 1971 that Kubrick was informed by one of his doctors that the neomycin should not have been administered in 1968.[12] This was the first time that anyone had suggested to Kubrick that negligence may have been involved. Kubrick thereafter brought a medical malpractice suit against the government under the FTCA.

The district court awarded damages to Kubrick for the VA Hospital's negligence in using the neomycin. The court rejected the government's argument that the suit was barred by the expiration of the limitations period. The court held that the statute began to run not when Kubrick became aware of the adverse injury and its cause but when Kubrick "had reason at least to suspect that a legal duty to him had been breached."[13] The Third Circuit affirmed, holding that the

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with bacteria or other microorganisms." J. SCHMIDT, ATTORNEYS' DICTIONARY OF MEDICINE AND WORD FINDER 0-56 (1981).

6. Tinnitis is "[a] ringing, hissing, roaring, or buzzing sound heard by a patient although no sound is actually being produced; i.e., a subjective sensation of sound in the ears." *Id.* at T-75.

7. Kubrick v. United States, 435 F. Supp. 166, 170-72 (E.D. Pa. 1977), *aff'd in part, remanded in part*, 581 F.2d 1092 (3d Cir. 1978), *rev'd*, 444 U.S. 111 (1979).

8. 444 U.S. at 113.

9. Kubrick v. United States, 435 F. Supp. 166, 171 (E.D. Pa. 1977), *aff'd in part, remanded in part*, 581 F.2d 1092 (3d Cir. 1978), *rev'd*, 444 U.S. 111 (1979).

10. 444 U.S. at 114.

11. Kubrick v. United States, 435 F. Supp. 166, 172 (E.D. Pa. 1977), *aff'd in part, remanded in part*, 581 F.2d 1092 (3d Cir. 1978), *rev'd*, 444 U.S. 111 (1979). There was considerable evidence, however, that would support the view that Kubrick did suspect negligence. *Id.* at 173.

12. *Id.* at 173.

13. *Id.* at 185.

statute does not run when the plaintiff can prove that "in the exercise of due diligence he did not know, nor should he have known, facts which would have alerted a reasonable person to the possibility that the treatment was improper. . . ."[14]

The United States Supreme Court reversed, holding that, in January 1969, Kubrick was aware of his injury and its probable cause and therefore, at that point, his claim accrued under the FTCA.[15] The Court stated that the purpose of the limitations period is for claimants to determine if they have a viable cause of action and, consequently, whether they should bring suit.[16]

This note will trace the developmental setting of the "accrual" issue in part II with an examination of the policies supporting statutes of limitations. Parts III and IV will analyze *Kubrick* and the issue will be compared with the manner in which state jurisdictions have resolved the problem. Finally, the practical impact of *Kubrick* will be discussed in part V of this note.

## II. HISTORICAL DEVELOPMENT

To appreciate the essence of *Kubrick*, a basic understanding of the underlying policies and objectives of statutes of limitations is necessary. Statutes of limitations rest on principles of sound public policy by "requiring parties to settle their business matters within certain reasonable periods."[17] Therefore, they promote the peace and welfare of society by not allowing affairs to "long remain uncertain."[18] Statutes of limitations are characteristically statutes of repose based upon the proposition that persons who "sleep upon their right" to bring a cause of action may lose that right after a specified period of time.[19] The obvious effect of placing a limitation on an action is that it effectively deprives one party of the opportunity, after a time, to pursue an otherwise valid claim.[20] The primary argument in favor of statutes of limitations is that of fairness to the defendant.[21] "There comes a time when . . . [a defendant] ought to

14. Kubrick v. United States, 581 F.2d 1092, 1097 (3d Cir. 1978), *rev'd*, 444 U.S. 111 (1979).

15. 444 U.S. at 118-23.

16. *Id.* at 124.

17. H. WOOD, LIMITATION OF ACTION 8 (2d ed. 1893).

18. H. BUSWELL, STATUTE OF LIMITATIONS AND ADVERSE POSSESSION 7 (1889).

19. *See* Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-49 (1944).

20. *Developments In The Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950) [hereinafter cited as *Statutes of Limitations*].

21. *Id.*

be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations."[22] Statutes of limitations are designed to "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."[23] They also relieve the court of the burden of adjudicating stale claims.[24]

The common law imposed no limit on the time in which an action had to be brought.[25] Therefore, any limitation placed on an action is the result of statutory enactment.[26] While the interests of the defendant dictate that he be free from defending against stale claims, the plaintiff's right to have reasonable access to the courts to litigate meritorious claims must also be protected. In enacting statutes of limitations, therefore, legislatures must strike a balance between the plaintiff's right to litigate meritorious claims and the defendant's right to be free from defending against stale claims.[27]

Statutes of limitations usually begin to run when a cause of action accrues.[28] A cause of action is said to accrue when a successful suit can be maintained.[29] The general rule for personal actions is that a claim accrues when the tortious act or omission is committed.[30] Under these circumstances, the tortious act itself is regarded as the ground for the action and all damages resulting from the act need not be sustained at that time.[31]

Against the background of the act or omission rule emerged the tort of medical negligence. Because of the nature of medical negligence,[32] the harm resulting from the tortious act or omission of a

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22. *Id.*

23. Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-49 (1944).

24. Burnett v. New York Cent. R.R. Co., 380 U.S. 424, 428 (1965).

25. H. WOOD, *supra* note 17, at 4.

26. *Id.*

27. Ruth v. Dight, 75 Wash. 2d 660, 665-66, 453 P.2d 631, 635 (1969).

28. *Statutes of Limitations*, *supra* note 20, at 1200.

29. *Id.*

30. Giambozi v. Peters, 127 Conn. 380, 384, 16 A.2d 833, 835 (1940); Cristiani v. City of Sarasota, 65 So. 2d 878, 879 (Fla. 1953).

31. Lattin v. Gillette, 95 Cal. 317, 319, 30 P. 545, 546 (1892); Sonbergh v. MacQuarrie, 112 Cal. App. 2d 771, 773, 247 P.2d 133, 135 (1952); Ogg v. Robb, 181 Iowa 145, 155, 162 N.W. 217, 220 (1917); Brown v. Tenn. Consol. Coal Co., 19 Tenn. App. 123, 138, 83 S.W.2d 568, 577 (1935).

32. One group of cases in which there has been extensive departure from the earlier rule that the statute of limitations runs although the plaintiff has no knowledge of the injury has involved actions for medical malpractice. Two reasons can be suggested as to why there has been a change in the rule in many jurisdictions in this area. One is the fact that in most instances the statutory period within which the action must be initiated is short— one year, or at most

doctor may not manifest itself or become noticed by the plaintiff until after the normal limitations period has expired. Courts recognized the harshness of the general rule and the hardship it placed upon the plaintiff when the delay in filing a claim was due to ignorance of the cause of action, not from a plaintiff willfully sleeping on his rights.[33] After being faced with situations in which foreign objects remained inside a patient following surgery, courts were willing to apply a "discovery rule" for determining the date of accrual for medical malpractice actions.[34] A "discovery rule" was applicable because these cases did not raise the problems that the statute of limitations was originally designed to guard against, such as fraudulent claims or difficulty of proof after the passage of time.[35] The "discovery rule" generally states that limitations do not begin to run, that is, actions do not accrue, until the plaintiff knows, or with reasonable diligence should know, of the injury and its cause.[36] Implicit in the adoption of the discovery rule for medical malpractice cases was the courts' willingness to place a premium on the right of the injured plaintiff to have adequate notice of an injury and subsequently bring suit. This was done, however, at the expense of the policy supporting the prevention of litigating stale claims.

In 1949, the United States Supreme Court in *Urie v. Thompson*[37] adopted the discovery rule for determining when a cause of action accrues under the Federal Employer's Liability Act.[38] Rejecting the government's argument that the act or omission rule governs the time when a cause of action accrues, the Court stated:

> We do not think the humane legislative plan intended such consequences to attach to *blameless ignorance*. Nor do we think those

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two, being the common time limit. This is for the purpose of protecting physicians against unjustified claims; but since many of the consequences of medical malpractice often do not become known or apparent for a period longer than that of the statute, the injured plaintiff is left without a remedy. The second reason is that the nature of the tort itself and the character of the injury will frequently prevent knowledge of what is wrong, so that the plaintiff is forced to rely upon what he is told by the physician or surgeon.

RESTATEMENT (SECOND) OF TORTS § 899, Comment e at 444 (1979).

33. Perdue, *The Law of Texas Medical Malpractice*, 11 HOUS. L. REV. 825, 839 (1974).

34. *See* note 68 *infra*.

35. Note, *Professional Malpractice—Statute of Limitation—Cause of Action Accrues in Professional Malpractice Tort Claim from the Date the Alleged Injury is Discovered—* Tom Olesker's Exciting World of Fashion, Inc., v. Dun & Bradstreet, Inc., 61 Ill. 2d 129, 334 N.E.2d 160 (1975), 25 DE PAUL L. REV. 568, 571 (1976).

36. *See* cases cited note 43 *infra*.

37. 337 U.S. 163 (1949).

38. 45 U.S.C. § 51 (1976).

> consequences can be reconciled with the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time after notice of the *invasion of legal rights*.[39]

In 1962 the Fifth Circuit, borrowing the blameless ignorance notion from *Urie*, adopted the discovery rule for medical malpractice suits brought against the federal government under the FTCA.[40] In *Quinton v. United States*,[41] the court held that a claim accrues when "the claimant discovered, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged malpractice."[42]

## III. ANALYSIS OF THE PROBLEM

The unique aspect of *Kubrick* is the manner in which each factor associated with the accrual of an action under the discovery rule can stand alone without reasonably drawing suspicion to the other factors. These factors are knowledge, or reasonable suspicion, of: The injury; its cause; and that a breach of legal duty may have occurred. If *A* punched *B*, for example, it would be reasonable to assume that at the time *B* was punched he knew or suspected: That he was injured; the cause of the injury; and that he may have a legal claim against *A*. All three factors emerged simultaneously. If, instead, *A* poisoned *B*, *B* may know he felt uncomfortable but may not know the cause. Once *B* discovered the cause it would be reasonable to assume that *B* should at least suspect that he had a legal claim against *A*. This pattern is usually consistent with situations in which foreign objects remained in a patient following surgery.

The problem is that breach of a legal duty was normally inferred from the discovery of an injury and its cause.[43] When

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39. 337 U.S. at 170 (emphasis added).

40. Quinton v. United States, 304 F.2d 234 (5th Cir. 1962).

41. 304 F.2d 234 (5th Cir. 1962).

42. *Id.* at 240. In 1956, plaintiff's wife was admitted to Larson Air Force Base Hospital and given three transfusions of the wrong blood type. The wife did not learn of, and in the exercise of reasonable care could not have discovered, this error until her pregnancy in 1959. She gave birth to a stillborn child and subsequently brought suit. *Id.* at 235. The court rejected the government's argument that the cause of action accrued at the time of the transfusion. *Id.* at 240-41.

43. Although most cases discuss discovery of the "acts of malpractice," they specifically make findings of the time at which the plaintiff should have discovered the injury or its cause, thereby assuming that a breach of legal duty would naturally follow. *See* Zeidler v. United States, 601 F.2d 527 (10th Cir. 1979) (hearing granted to determine when plaintiff should have discovered his injury and its cause); Exnicious v. United States, 563 F.2d 418 (10th Cir. 1977) (plaintiff told that soreness after shoulder surgery

Kubrick discovered his injury, tinnitus, the cause could not be reasonably suspected and, when the cause became known, Kubrick argued that negligence could not be reasonably suspected.[44] That is, recognition or awareness of one factor could not reasonably alert Kubrick to suspect another factor. The application of the rationale of previous cases, particularly *Quinton*, to the facts of *Kubrick* presents difficulties arising primarily from the use of imprecise language. Is "discovery of the malpractice" discovery of the injury, its cause, breach of a legal duty, or a particular combination of some or all of these factors?

In the majority of medical malpractice cases, discovery of the injury and its cause is all that is required to trigger the running of the statute of limitations because breach of a legal duty naturally can be inferred.[45] In only one federal case has the *Kubrick*-type fact pattern been litigated under the FTCA. In *Jordan v. United States*,[46] plaintiff suffered from chronic sinusitis and underwent nose surgery in the hope of alleviating his sinus condition. After the operation, complications arose in his left eye. Doctors, in response to his questions, told plaintiff that the eye problems were the result of muscle damage caused by the procedures required to deal with the unanticipated severity of his sinus condition.[47] In 1971, three years after the surgery, a doctor told plaintiff there was nothing more he could do for the eye and that it was "too bad they screwed up your eye when they operated on your nose."[48] Plaintiff brought suit under the FTCA. The government claimed that the statute of limitations had run because plaintiff had been aware of his injury and its cause for more than two years. The Sixth Circuit found that the evidence failed to show that plaintiff "should have been aware that the muscle damage may have

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was due to traumatic arthritis, when actual cause was aseptic necrosis); Bridgeford v. United States, 550 F.2d 978 (4th Cir. 1977) (plaintiff unaware of causal nexus between femoral vein severed during operation and later complications); Portis v. United States, 483 F.2d 670 (4th Cir. 1973) (plaintiff unaware of causal nexus between improper administration of neomycin and her resulting deafness); Tyminski v. United States, 481 F.2d 257 (3d Cir. 1973) (plaintiff told cause of paraplegia was arteriovenus angioma, when actual cause was epidural hematoma); Toal v. United States, 438 F.2d 222 (2d Cir. 1971) (plaintiff unaware of causal nexus between pantopaque retention from myelogram and subsequent brain damage); Quinton v. United States, 304 F.2d at 234 (plaintiff's wife unaware of her injury).

44. *See* cases cited note 60 *infra*.

45. 444 U.S. at 128 (Stevens, J., dissenting).

46. 503 F.2d 620 (6th Cir. 1974).

47. *Id.* at 621.

48. *Id.*

been the result of . . . improper performance. . . ."[49] The *Jordan* court stated:

> Affirmance of the district court's decision under these circumstances would perpetrate an injustice similar to the one sought to be corrected by the adoption of the so-called "discovery" rule in the federal and state courts since appellant's claim would be barred prior to the time when he had any reasonable cause to believe that the acts which caused his injury were wrongful.[50]

The reasoning in *Jordan* is consistent with the blameless ignorance concept introduced in *Urie*.

The district court in *Kubrick* reasoned that, because of the technical complexity of the case, a person exercising reasonable diligence would not have been alerted to the possibility that he may have been legally wronged.[51] Though there was an awareness of the injury and its cause, the court stated there is a rebuttable presumption that knowledge of the injury and its cause will alert a reasonable person to suspect that he may have been the victim of negligence.[52] Finding that Kubrick exercised reasonable diligence in pursuing his claim, the court stated that it did not believe it reasonable to start the statute running until plaintiff at least had reason to suspect that a legal duty to him had been breached.[53] The court's reasoning brought the blameless ignorance notion to its logical conclusion.

Reversing the lower courts, the Supreme Court insisted that knowledge of the injury and its cause invokes an irrebutable presumption of invasion of legal rights.[54] The Court stated that once a plaintiff knows of his injury and its cause all he need do is make inquiries into whether he may be the victim of negligence.[55] The Court's holding appears to be based generally on two factors: Congressional intent and stale claims litigation.

The Court stated that "[t]here is nothing in the language or the legislative history of the . . . [FTCA] that provides a substantial basis for the Court of Appeals' construction of the accrual language of . . . [section] 2401(b)."[56] This is correct; but, at the same time, there

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49. *Id.* at 624.

50. *Id.*

51. Kubrick v. United States, 435 F. Supp. 166, 185 (E.D. Pa. 1977), *aff'd in part, remanded in part*, 581 F.2d 1092 (3d Cir. 1978), *rev'd*, 444 U.S. 111 (1979).

52. *Id.* at 182.

53. *Id.* at 185-86.

54. 444 U.S. at 122-24.

55. *Id.*

56. *Id.* at 119.

is no indication of congressional intent that would support the Supreme Court's construction of the accrual language.[57] The Court's construction of congressional intent was premised upon the general proposition that Congress intended the prompt presentation of claims by setting a two-year limitations period.[58] As the dissent pointed out, however, appellate courts have consistently applied the discovery rule for decades without any indication of congressional hostility.[59]

The Court's fear of litigating stale claims is not unfounded; but, unless the Court is prepared to denounce the discovery rule entirely and insist upon instituting an act or omission rule, the possibility of litigating stale claims always is present. It appears that courts that have adopted the discovery rule have accepted the possible consequence of litigation of stale claims in return for the equitable treatment of the medical negligence victim. Whether the Supreme Court's fine tuning of the discovery rule in *Kubrick* actually will reduce the number of stale claims that would have been presented is a provocative question. The answer may lie in the realization that there have been only two cases presented in federal court over the past twenty years that have raised this question, *Jordan* and *Kubrick*. Also, in the vast majority of cases, negligence should be suspected.[60] In the few remaining cases, innocent or intentional misrepresentation could be alleged which would also have the effect of tolling the limitations period.[61] Overall, the Court's decision will probably

57. The Court essentially admitted that nothing instructive can be inferred from the legislative history. *Id.* at 119 n.6.

58. *Id.* at 117.

59. *Id.* at 127. *See also* notes 37 & 38 *supra* and accompanying text.

60. *See, e.g.*, Casias v. United States, 532 F.2d 1339 (10th Cir. 1976) (plaintiff reasonably should have suspected negligence when after an injection injured a sciatic nerve, he was aware that resulting paralysis in left leg was caused by injection); Reilly v. United States, 513 F.2d 147 (8th Cir. 1975) (where doctor originally stated hoarse condition would quickly heal after endotracheal intubation, plaintiff reasonably should have suspected negligence after discovery that tracheal stenosis had developed); Ciccarone v. United States, 486 F.2d 253 (3d Cir. 1973) (plaintiff reasonably should have suspected negligence when a deterioration in health was immediately apparent after injection of blue dye in plaintiff's spinal column to determine cause of recurrent meningitis attacks); Brown v. United States, 353 F.2d 578 (9th Cir. 1965) (court found there was knowledge of sufficient facts to alert a reasonable person that there may have been negligence when parents knew that their premature child's blindness was caused by administration of excessive oxygen).

61. Innocent or intentional misrepresentation as a defense to the running of the statute of limitations has yet to be asserted under the Federal Tort Claims Act, but has been readily accepted under other federal acts. *See, e.g.*, Holifield v. Cities Serv. Tanker Corp., 421 F. Supp. 131 (E.D. La. 1976) (unawareness of full extent of injury by plantiff in a case arising under the Jones Act, 46 U.S.C. § 688 (1976), does not necessarily consti-

have little impact upon reducing the number of stale claims that may be brought.

## IV. COMPARISON WITH STATE DECISIONS

The same equitable principles that encouraged adoption of the discovery rule for medical negligence cases in federal courts also encouraged adoption of the discovery rule in state courts. A review of how state courts have handled the posited issue is enlightening. Only a limited number of jurisdictions have had the opportunity to litigate this specific issue.[62] Until approximately seven years ago, the state legislatures were content to permit the courts to exercise a free hand in determining when causes of action would accrue. With the recent modification of many state statutes of limitations for medical malpractice, it appears that few states will have the opportunity to litigate the *Kubrick* issue. In assessing the reason for the modification of many state statutes of limitations it may be concluded that the equitable principles of justice and fairness, which served as the foundation for the adoption of the discovery rule, have been seriously assaulted in the past six years by the realities of business economics.

When insurance companies intimated that medical malpractice was becoming an uninsurable risk,[63] state legislatures were quick to intervene and enact comprehensive medical malpractice legislation that involved, among other things, modifying the statute of limitations for medical malpractice actions.[64] The problem is stated in Utah's legislative findings set out in its Medical Malpractice Act:

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tute innocent or intentional misrepresentation by doctor when true extent of injury not determined until surgery); Mumpower v. Southern Ry. Co., 270 F. Supp. 318 (W.D. Va. 1967) (innocent misrepresentation held a valid defense in a case arising under the Federal Employer's Liability Act, 45 U.S.C. § 51 (1976), when doctor informed plaintiff he suffered no injuries when, in fact, plaintiff had ruptured disc that required surgery).

62. *See generally* Leary v. Rupp, 89 Mich. App. 145, 280 N.W.2d 466 (1979); Alfone v. Sarno, 139 N.J. Super. 518, 354 A.2d 654 (1976); Ohler v. Tacoma Gen. Hosp., 92 Wash. 2d 507, 598 P.2d 1358 (1979).

63. *See* U.S. DEP'T OF HEALTH, EDUC. & WELFARE, MEDICAL MALPRACTICE: REPORT OF THE SECRETARY'S COMM'N ON MEDICAL MALPRACTICE (1973); Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 TEX. L. REV. 759 (1977); Note, *Medical Malpractice Statute of Limitations as Special Legislation*, Woodward v. Burnham City Hospital, 60 Ill. App. 3d 285, 377 N.E.2d 290 (1978), 55 CHI.-KENT L. REV. 519 (1979). Some authorities dispute the existence of a medical malpractice crisis. *See* Cunningham & Lane, *Malpractice—The Illusory Crisis*, 54 FLA. B.J. 114 (1980); Fuchberg, *Myths of Medical Malpractice*, 11 TRIAL L.Q. 49 (1976).

64. *See* note 67 *infra*.

> The legislature finds and declares that the number of suits and claims for damages . . . from health care has increased greatly in recent years. Because of these increases the insurance industry has substantially increased the cost of medical malpractice insurance. . . .
> In view of these recent trends, . . . it is necessary to protect the public interest by enacting measures designed to encourage private insurance companies to continue to provide health-related malpractice insurance. . . .
> In enacting this act, it is the purpose of the legislature to provide a reasonable time in which actions may be commenced against health care providers while limiting that time to a *specific period* for which professional liability insurance premiums can be reasonably and accurately calculated. . . .[65]

Legislative limiting of the amount of time within which a medical malpractice claim may be brought to within a specific period from the date of the negligent act illustrates that the policy of attempting to compensate all victims of medical negligence through the judicial adoption of the discovery rule clearly has yielded to economic realities. This does not reduce the viability of continued inquiry, however, because the discovery rule still survives within the confines of the act or omission rule. An example of this type of hybrid discovery rule has been adopted in North Dakota and states:

> The following actions must be commenced within two years after the cause of action has accrued:
> . . . .
> 3. An action for the recovery of damages resulting from malpractice, provided, however, that the limitation of an action against a physician or licensed hospital will not be extended beyond six years of the act or omission of alleged malpractice by a nondiscovery thereof. . . .[66]

Twenty-four jurisdictions[67] have adopted this hybrid limitations

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65. UTAH CODE ANN. § 78-14-2 (1976) (emphasis added).

66. N.D. CENT. CODE § 28-01-18(3) (Supp. 1977).

67. *See* ALA. CODE § 6-5-482 (1975); CAL. [CIV. PROC.] CODE § 340.5 (West Cum. Supp. 1981); COLO. REV. STAT. § 13-80-105 (Cum. Supp. 1980); CONN. GEN. STAT. ANN. § 52-584 (West Cum. Supp. 1981); DEL. CODE ANN. tit. 18, § 6856 (Cum. Supp. 1980); FLA. STAT. ANN. § 95.11(4)(b) (West Cum. Supp. 1981); HAWAII REV. STAT. § 657-7.3 (Supp. 1980); ILL. ANN. STAT. ch. 83, § 22.1 (Smith-Hurd Supp. 1981); IOWA CODE ANN. § 614.1(9) (West Cum. Supp. 1981); KAN. STAT. ANN. § 60-513(7)(c) (1976); KY. REV. STAT. ANN. § 413.140(2) (Baldwin Cum. Supp. 1980); LA. REV. STAT. ANN. § 9:5628 (West Supp. 1981); MD. [CTS. & JUD. PROC.] CODE ANN. § 5-109 (1980); NEV. REV. STAT. § 41A.097 (1979); N.C. GEN. STAT. § 1-15(c) (Cum. Supp. 1979); N.D. CENT. CODE § 28-01-18(3) (Supp. 1977); OKLA. STAT. ANN. tit. 76, § 18 (West Cum. Supp.

statute, while twelve jurisdictions[68] retain the unadulterated discovery rule.

Relatively few jurisdictions have litigated the issue posited in *Kubrick*.[69] Because many of the new hybrid statutes specifically state that a claim accrues when a claimant reasonably should have discovered his injury, the issue will be moot in these jurisdictions. The imprecise language employed in pre-*Kubrick* federal cases has plagued the few courts that have touched upon the issue of accrual.[70] Courts that have litigated the correctly articulated issue generally have chosen to follow the rationale of the *Kubrick* district court. The Washington Supreme Court and appellate courts in Michigan and New Jersey are three such examples.

In *Ohler v. Tacoma General Hospital*,[71] the Washington Supreme Court held that appellant's claim "did not accrue until she discovered all the essential elements of her possible cause of action, *i.e.*, duty, breach, causation, damages."[72] In Michigan the court of appeals held that for an action to accrue, a person must discover "the

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1980); OR. REV. STAT. § 12.110(4) (1979); S.C. CODE § 15-3-545 (Cum. Supp. 1980); TENN. CODE ANN. § 23-3415 (Cum. Supp. 1979); UTAH CODE ANN. § 78-14-4 (Supp. 1979); VT. STAT. ANN. tit. 12, § 521 (Cum. Supp. 1981); WASH. REV. CODE ANN. § 4.16.350 (Cum. Supp. 1981); WIS. STAT. ANN. § 893.55 (West Cum. Supp. 1981).

68. *See* Burns v. Bell, 409 A.2d 614 (D.C. 1979); Franklin v. Albert., 1980 Mass. Adv. Sh. 2187, 411 N.E.2d 458; Dyke v. Richard, 390 Mich. 739, 213 N.W.2d 185 (1973); Johnson v. St. Patrick's Hosp., 148 Mont. 125, 417 P.2d 469 (1966); Spath v. Morrow, 174 Neb. 38, 115 N.W.2d 581 (1962); Shillady v. Elliot Community Hosp., 114 N.H. 321, 320 A.2d 637 (1974); Fernandi v. Strully, 35 N.J. 434, 173 A.2d 277 (1961); Ayers v. Morgan, 397 Pa. 282, 154 A.2d 788 (1959); Wilkinson v. Harrington, 104 R.I. 224, 243 A.2d 745 (1968); Gaddis v. Smith, 417 S.W.2d 577 (Tex. 1967); Morgan v. Grace Hosp., Inc., 149 W. Va. 783, 144 S.E.2d 156 (1965); WYO. STAT. ANN. § 1-3-107 (1977).

69. *See* notes 71-74 *infra* and accompanying text.

70. In Florida, notice of "invasion of legal rights" has been construed to mean notice of the "cause." Tetstone v. Adams, 373 So. 2d 362, 363 (Fla. Dist. Ct. App. 1979); Almengor v. Dade County, 359 So. 2d 892, 894 (Fla. Dist. Ct. App. 1978).

Although the New Hampshire Supreme Court ardently supported plaintiff's position that an action should not accrue until plaintiff suspected "negligence," a reading of the facts of the case indicates that it was actually the "cause" of the injury that was not suspected by plaintiff. Brown v. Mary Hitchcock Memorial Hosp., 117 N.H. 739, 744, 378 A.2d 1138, 1141 (1977).

71. 92 Wash. 2d 507, 598 P.2d 1358 (1979).

72. *Id.* at 511, 598 P.2d at 1360. Plaintiff was born prematurely and placed in an incubator. She was administered "too much oxygen" which caused her loss of sight. Plaintiff knew that her blindness was caused from too much oxygen but always believed that the oxygen had been administered properly and was necessary for her treatment as a premature baby. *Id.* at 508-09, 598 P.2d at 1359. The court found it was a question of fact whether plaintiff knew or should have known that the result was a breach of the hospital's duty. *Id.* at 510-11, 598 P.2d at 1360. *But see* Brown v. United States, 353 F.2d 578 (9th Cir. 1965); Ikenn v. Northwestern Memorial Hosp., 73 Ill. App. 3d 694, 392 N.E.2d 440 (1979).

act or omission itself, . . . and have a good reason to believe the act itself was improper. . . ."[73] The New Jersey Superior Court, Appellate Division, stated that for triggering the start of the statute of limitations the patient needed to discover that the injury "was related to fault on the part of the physician as distinguished from mere knowledge of a causal relationship . . . between the doctor's acts and the injury."[74] These are essentially the only cases that have differentiated between the time of the discovery of the injury, its cause, and suspicion of negligence.

Other jurisdictions have litigated cases that essentially parallel *Kubrick*-type fact patterns, but the courts have failed to recognize the issue in *Kubrick*-like terms. Appellate courts in the District of Columbia and Texas have held that it is a question for the trier of fact to determine when a claimant should have discovered his injury.[75] In those cases, however, the physical injury and its cause were always known by the claimants. Based on a reading of the facts, the courts actually implied that the limitations period starts, not when the claimant discovers the injury, but when the claimant should have suspected that the physician's conduct was negligent.

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73. Leary v. Rupp, 89 Mich. App. 145, 149, 280 N.W.2d 466, 468 (1979). The patient developed an allergic reaction from the drugs prescribed by defendant. The patient knew the allergic reaction was caused by the drugs. The court stated that "while the plaintiff knew of some of the acts, i.e., the prescribing of polycillin and prednisone, and the resulting harm, allergic reaction and pain in the legs, reasonable minds could differ as to when she should have realized that the doctor had acted improperly." *Id.* at 149-50, 280 N.W.2d at 468.

74. Alfone v. Sarno, 139 N.J. Super. 518, 520, 354 A.2d 654, 655 (1976).

75. Plaintiff, in Burns v. Bell, 409 A.2d 614 (D.C. 1979), received a facelift operation from defendant. After surgery, in August 1968, plaintiff noticed what she called "gross scars" and also experienced numbness around the surgical area. Defendant indicated that these conditions would improve with time, and later assured plaintiff that she was progressing satisfactorily. *Id.* at 614-15. Plaintiff, in 1974, recommended defendant to one of her friends and after seeing the results of her friend's surgery, concluded that she had not healed properly. Plaintiff subsequently brought suit in 1977. *Id.* at 615. The court of appeals remanded for a determination of when plaintiff should have reasonably discovered her injury. *Id.* at 617-18.

The appellate court in Texas similarly held that the question of when plaintiff should have discovered her injury is a factual inquiry. Fitzpatrick v. Marlowe, 553 S.W.2d 190 (Tex. Civ. App. 1977). Defendant operated on plaintiff to alleviate a sinus condition and to remove a small bump from her nose. Her nose swelled and the bump remained. After defendant's assurances that plaintiff's nose would improve, plaintiff underwent a second operation to correct the bump. Plaintiff then had a dip in her nose instead of a bump, and again her doctor assured her that her nose would improve. In 1975, another physician advised plaintiff that her nose had been "messed up," whereupon plaintiff filed suit. *Id.* at 193-94.

## V. PRACTICAL EFFECT AND CONSIDERATIONS

The patent effect of *Kubrick* is that it overrules the holding in *Jordan*. It also overrules a line of dictum used in federal cases since *Urie* stating that a malpractice action accrues when the plaintiff suspects the invasion of his legal rights.[76]

The latent effect of the decision is more devastating. In an attempt to bar a very limited number of medical malpractice claims from being litigated in federal court, the Supreme Court has, in effect, created, in every government hospital,[77] a nonlegal presumption of negligence for every unsuccessful treatment or unforeseeable result regardless of how innocent the action may have been. In a medical community that is already bitter over the jurisprudential intervention into its profession,[78] *Kubrick* will place further strain on those sentiments by requiring patients to investigate and scrutinize unsuccessful results of their treatment. Under similar circumstances, Judge Pashman of the New Jersey Supreme Court stated that "[t]he majority's position in this regard assumes a consciousness of potential litigation that is unrealistic even in the litigious society we live in today and will, on pain of forfeiture, force persons to act with excessive caution to safeguard their legal rights."[79]

The corollary to these latent effects is just as significant. The economic strains on the patient of retaining an attorney, consulting medical experts, and possibly employing discovery procedures, only to be advised that one's treatment was proper, is unjust and unreasonable. In view of the established "conspiracy of silence" in the medical profession, the Supreme Court's assertion that the patient needs merely to consult another physician is rather tenuous.[80] In addition, it would be a spurious assumption to reasonably expect a patient to consult with another physician when the patient does not suspect any wrongdoing. Likewise, it would be equally unjust to im-

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76. *See* notes 43 & 60 *supra*.

77. "The VA operates the largest hospital system in the nation. Included in its program are about 170 separate hospitals, with almost 100,000 beds, in which about 1 million patients each year receive treatment." D. ADDLESTONE, S. HEWMAN & F. GROSS, THE RIGHTS OF VETERANS 193 (1978).

78. *See* Cohn, *Medical Malpractice Litigation: A Plague on Both Houses*, 52 A.B.A.J. 32 (1966); Dean, *A Physician's View*, 49 FLA. B.J. 504 (1975); Demy, *Practice and Malpractice (One Doctor's Viewpoint)*, 19 MED. TRIAL TECH. Q. 61 (1973); Powers, *Interprofessional Education and The Reduction of Medico-Legal Tensions*, 17 J. LEGAL EDUC. 167 (1964).

79. Burd v. New Jersey Tel. Co., 76 N.J. 284, 298-99, 386 A.2d 1310, 1318 (1978) (products liability action).

80. 444 U.S. at 128-29 n.4 (Stevens, J., dissenting).

pute constructive knowledge of the effect of *Kubrick* upon all who enter a government hospital.

Yet, to maintain a perspective on how *Kubrick* and the issue of accrual should be resolved, it must be remembered that state courts were first to recognize the inherent inequities in applying the act or omission rule to medical negligence cases and, consequently, adopted the discovery rule. Federal courts followed suit. The lag can be attributed to the nonexistence of medical negligence claims against the government until the legislative waiver of government tort immunity through the enactment of the FTCA. Federal case law has, since then, progressed far beyond that of many states. There are some state courts, however, that have resolved the *Kubrick* issue. Federal courts have failed to take cognizance of these decisions. Nevertheless, while the federal courts have been oblivious to the state court decisions since the adoption of the discovery rule in *Quinton*, the equities that spurred both the state and federal courts to adopt the discovery rule are now being compromised in the state legislatures because of the economic realities of the insurance crisis. State legislators realized that an attempt to compensate all who have been injured could have resulted in no one being compensated.

The conception that insurance companies have huge reserves of money to compensate those who are injured must go by the wayside. The same misconception might be attributed to the federal government: The same concerns that affected the state legislatures may also affect the federal government. Justice Holmes stated, "The life of the law has not been logic: it has been experience."[81] Perhaps the equitable principles that encouraged abandonment of the logical act or omission rule must now, in light of economic realities, act to restrain the equitable logic of the discovery rule. If this is the case, perhaps there should be constraints on the presently unencumbered discovery rule as it exists within the FTCA. An adjustment that would act to create a hybrid discovery[82] rule is within the proper scope of the legislature. The unintentional, negligible effort by the Supreme Court to limit the discovery rule eventually will do more harm than good.

## VI. CONCLUSION

Statutes of limitations essentially are statutes of repose. Their original purpose was to protect the defendant from having to defend

81. O. HOLMES, THE COMMON LAW 1 (1881).
82. *See* note 67 *supra* and accompanying text.

himself against stale and sometimes fraudulent claims. Simultaneously, however, statutes of limitations might also preclude what otherwise may be a valid claim. Originally, an action would accrue at the time of the tortious act or omission. This standard caused great injustices in cases of medical malpractice. Recognizing the harshness of the general rule, courts displayed a willingness to place a premium on the rights of the plaintiff by adopting a discovery rule. The discovery rule has been used for over eighteen years to determine when a medical malpractice claim accrues under the FTCA, without congressional complaint. Despite this silence, the United States Supreme Court found that the prompt presentation of claims is of paramount interest to the legislature and consequently held that a patient's claim had accrued before the time that he became aware that a legal duty owed to him had been breached. The arguments used by the Court are tenuous. Even in light of the recent trend to reduce the number of medical malpractice claims, the adverse effects associated with the Supreme Court's limiting of the discovery rule cannot be justified. If there is a desire or need to cut back on the number of medical malpractice claims under the FTCA, particularly stale claims, Congress is in the proper position to take action. Enactment of a hybrid discovery rule as that adopted by North Dakota and twenty-three other jurisdictions appears to be the most equitable solution.

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